THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

JOHN BEN SHEPPERD
ATTORNEY GENERAL

September 27, 1955

Honorable Robert S. Calvert
Comptroller of Public Accounts
Austin, Texas

Letter Opinion No. MS-241

Re: Rate of compensation for certain officers and employees for the period of September 1 through September 5, 1955.

Dear Mr. Calvert:

You have requested an opinion on the rate of compensation to be paid to certain officers and employees of the State for the period of September 1 through September 5, 1955. The question arises because of the fact that Senate Bills 40, 204, and 360 (Chapters 118, 329, and 418), Acts of the 54th Legislature, each of which purports to affect salary rates for this period, did not become effective until September 6, 1955. Each of these bills was passed by a viva voce vote in one or both houses of the Legislature and therefore became effective 90 days after adjournment of the session, or on September 6, 1955. Tex.Const. Art. III, Sec.39; Att'y Gen. Op. S-163 (1955).

Senate Bill 40 provides for the suspension during the 1955-1957 biennium of all laws (with exceptions not here involved) fixing salaries of State officers and employees and provides that salaries "for the period beginning September 1, 1955 and ending August 31, 1957," shall be in such sums as provided in the general appropriations act. House Bill 140, the biennial appropriation act, which became effective on September 1, 1955, provides salaries for a number of officers and employees in excess of the amount set in the legislative enactments which Senate Bill 40 undertakes to suspend. The question is whether the salaries for these officers and employees during the first five days of September should be paid at the rates fixed in the statutes which are the subject of suspension in Senate Bill 40 or at the rates fixed in the general appropriation act.

Senate Bill 204 increases the compensation of district attorneys, and provides that "from and after September 1, 1955," they shall be paid at the rate fixed in that bill. Senate Bill 360 increases the compensation of members of the Supreme Court and Court of Criminal Appeals and provides that "from and after August 31, 1955," these officers shall be paid at the rate fixed in that bill. The general appropriation act and Senate Bill 89 (which became effective on June 15, 1955) appropriate sums for payment of

the salaries of the district attorneys and the members of the Supreme Court and Court of Criminal Appeals at the increased rates, beginning September 1, 1955.

Senate Bill 40 does not operate to suspend salary laws which were passed by the 54th Legislature, and therefore does not suspend Senate Bills 204 and 360. Att'y Gen. Op. V-1286 (1951). The question with respect to these salaries is whether they should be paid for the first five days of September at the rates fixed in the general laws prior to Senate Bills 204 and 360 or at the rates fixed in these two bill.

An appropriation act cannot alter or amend a general law and cannot increase the salary of an officer or employee above the amount authorized by the general law which is controlling for the period during which the services are rendered. State v. Steele, 57 Tex. 200 (1882); Att'y Gen. Op. V-1254 (1951). We must therefore determine what general laws govern for the first five days of September. If Senate Bills 40, 204, and 360, on their effective date, related back to September 1, the salaries should be paid at the rates provided in those bills, although warrants in payment of the increases could not have been issued until after their effective date since no action could have been taken under them until they became effective. Att'y Gen. Op. S-163, supra. If they cannot relate back, the salaries should be paid at the rates fixed by the general laws then in effect.

From the express provisions in these bills, it is evident that the Legislature intended for them to govern the compensation of the affected officers and employees during the period in question. This intent should be carried out unless some constitutional provision would be violated by doing so. As a general rule, statutes operate prospectively, but they may operate retrospectively when it is apparent that such was the intention, unless prohibited by the Constitution. Cox v. Robison, 105 Tex. 426, 150 S.W. 1149 (1921); American Surety Co. of New York v. Axtell Co., 120 Tex. 166, 36 S.W.2d 715 (1931). The two constitutional provisions which must be considered in this connection are Article I, Section 16 and Article III, Section 44 of the Texas Constitution.

Section 16 of Article I prohibits the enactment of any retroactive law. This provision is construed merely as forbidding the enactment of any law that will prejudicially affect existing, vested rights. 39 Tex. Jur., Statutes, Sec. 27. A statute is retroactive in the prohibited sense only if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or adopts a new disability in respect to transactions or considerations already passed." Turbeville v. Gowdy, 272 S.W. 559 (Tex.Civ.App. 1925). The rights protected are private rights and not the rights and liabilities of

the State itself. A State may constitutionally pass retroactive laws waiving or impairing its own rights and it may impose upon itself new liabilities with respect to transactions already past, unless prohibited by other constitutional provisions (such as, for example, Section 44 of Article III of the Texas Constitution). See cases cited in 16 C.J.S., Constitutional Law, Sec. 417.

It is our opinion that this constitutional provision would not be violated by giving these statutes a retroactive effect. The liabilities of taxpayers, as distinguished from the liabilities of the government, are not increased, nor are the rights of the affected officers and employees or of any other individual impaired.

Section 44 of Article III reads as follows:

> "The Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors, not provided for in this Constitution, but shall not grant extra compensation to any officer, agent, servant, or public contractors, after such public service shall have been performed or contract entered into for the performance of the same; nor grant, by appropriation or otherwise, any amount of money out of the Treasury of the State, to any individual, on a claim, real or pretended, when the same shall not have been provided for by pre-existing law; . . ."[1]

It is noted that there are two different clauses of this section which apply to compensation of public officers. The purport of the two clauses is the same. One clause prohibits the granting of extra compensation after the service is performed, and the question for our determination is whether the time of making the grant is the date of enactment of the law or the date on which it takes effect. The other clause prohibits the granting of money to pay a claim not provided for by pre-existing law, and the question similarly is whether the time of enactment or the effective date controls in determining when an act of the Legislature becomes pre-existing law within the meaning of this section.

The Texas courts have not had occasion to decide these questions. In Austin National Bank v. Sheppard, 123 Tex. 272, 71 S.W.2d 242 (1934), the question before the court was whether pre-existing law meant only a direct pre-existing statutory law or whether it included a rule of common law. Incidental to deciding

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1/Cf. Tex.Const. Art. III, Sec. 53, placing similar restrictions on granting extra compensation and payment of claims against counties and municipalities.

that it included common law as well as statutory law, the court said that this provision meant that the Legislature cannot appropriate state money to any individual unless "at the very time the appropriation is made, there is already in force some valid law constituting the claim the appropriation is made to pay a legal and valid obligation of the state." It is obvious that the court did not intend to say that an appropriation could not be made to pay a claim arising under a statute which had been duly enacted but which had not yet gone into effect. Such a holding would mean that the Legislature could not make appropriations to carry out the laws enacted by it which became effective after adjournment. It would mean, as applied to the present case, that the appropriations to pay the increased salaries during any portion of the biennium were invalid, since the "pre-existing law" supporting their payment was not in force at the time the appropriations were made. The error of such a proposition is patent. We might observe, further, that the existence of the law at the time the claim arose rather than at the time the appropriation was made would seem to be the proper test.

In Popham v. Patterson, 121 Tex. 615, 51 S.W.2d 680 (1932), and in other cases citing it, none of which involve Section 44, the statement is made that an act of the Legislature becomes a law on its effective date. In that case the court was deciding merely that a law may operate as notice of its provisions on the effective date fixed by the Constitution even though the provisions of the law do not themselves become operative until a later date. The court was concerned with the question of when an enactment operates as notice and not whether it becomes a law before that time.

In Woods v. Reilly, 211 S.W.2d 591, 598 (Tex.Civ.App. 1948, rev'd on other grounds in 147 Tex. 586, 218 S.W.2d 437), the court recognized that a law can come into existence prior to its effective date. "Many laws are enacted to become effective upon a future date. The existence of the law is requisite to its becoming effective. The law is not repealed, rescinded or cancelled by such a provision; it is merely held in suspense until the time arrives for it to be put into actual operation."

From the foregoing review, it is seen that the Texas decisions are inconclusive on the question before us. In 50 Am. Jur., Statutes, Sec. 502, we find this statement:

> "A distinction has been observed between the time when a bill becomes a law and the time when it goes into effect or begins to operate. A bill is ordinarily regarded as becoming a law upon its enactment in the manner prescribed, but the time as of which its provisions become operative may be earlier by application of a legal fiction, or later by the application of an express statutory or constitutional provision."

Section 39 of Article III of the Texas Constitution states that "no law passed by the Legislature . . . shall take effect or go into force" until 90 days after adjournment, etc. The use of the word law is significant. The Constitution does not say that no bill shall become a law until its effective date; it presupposes that the law has come into existence before its effective date. Schaffner v. Shaw, 191 Iowa 1047, 180 N.W. 853 (1920).

This construction as to the time at which a bill becomes a law is supported by the prior and contemporaneous construction of the word "law" by the Legislature. Article 4331 of the Revised Civil Statutes provides that the Secretary of State shall attend at every session of the Legislature to receiving bills which have become laws. A similar provision was included in the act passed by the first Legislature of the State of Texas defining the duties of the Secretary of State (Act of the 1st Leg., 1846, p. 191; 2 Gammel's Laws 1497) and was repeated in Article 2722 of the Revised Statutes of 1879.

In Schaffner v. Shaw, supra, it was contended that payment of a salary increase for district judges violated a constitutional provision prohibiting the legislature from increasing or diminishing the compensation of judges during their term of office. An amendment to the Iowa Code increasing the salaries of district judges was approved by the Governor on April 12, but the measure did not become effective until July 4, under a constitutional provision that "no law of the General Assembly . . . shall take effect until the fourth day of July next, after the passage thereof." The terms of the judges involved commenced between the date of approval and the effective date. The crucial question was whether the amendment became a law before the beginning of the term, just as the question in our case is whether the bills under consideration were "pre-existing law" when the services were performed. The court held:

> "The bill then became a law upon its approval by the Governor, or, in the absence of such approval as prescribed by the Constitution, the taking effect only to be postponed. It follows, then, that the increased compensation provided by the amendment . . . became a law before, and not during the terms of Judges DeLand and Thompson, and they were entitled to the compensation authorized thereby from the time the law took effect."[2]

2/In that case the amendment had not purported to change the salary rate for the services performed before its effective date. In keeping with the rule that statutes operate prospectively unless a contrary intention is manifested, the court held that the increase operated from the time the law took effect.

In Broadwater v. Kendig, 80 Mont. 515, 261 Pac. 264 (1927), the court was construing a statute which provided that the salary of a municipal officer must not be increased or diminished during his term of office. The city council had passed an ordinance on April 22, increasing the salary of the mayor from and after May 1, the date on which the new term would begin. Because of a statute which provided that no ordinance should become effective until 30 days after its passage, the ordinance did not become effective until May 22, after the new term had begun. The court held that the salary increase was granted on the date of enactment and therefore did not violate the prohibition against changing the salary during a term of office:

> "In our opinion it is the time of the enactment of the ordinance providing for the change of salary rather than the effective date which is controlling. A statute to take effect in futuro is a law in praesenti. An act has a potential existence upon its passage despite the fact that its effective date is postponed. 'That a statute or constitutional provision may have a potential existence, but which will not go into actual operation until a future time, is familiar law.' (Citing authorities)"

Upon a consideration of all the authorities, it is our opinion that Senate Bills 40, 204, and 360 constitute pre-existing law for payment of salaries at the rates provided in House Bills 140 and 89 during the first five days of September. You are therefore advised that the salaries of the affected officers and employees should be paid at those rates.

You have referred us to certain former opinions of this office. Opinion V-920 (1949) was decided on the basis of a provision in the general appropriation act which does not appear in House Bill 140 and is therefore not in point. Without mentioning the question of retroactivity, Opinion V-1286 (1951) held, under facts similar to those here involved with respect to Senate Bills 204 and 360, that the salaries at the increased rates should be paid only from the effective date of the statutes providing for the increase. Opinion V-1286 is hereby overruled insofar as it conflicts with this opinion.

APPROVED:

Davis Grant
Reviewer

John Ben Shepperd
Attorney General

Yours very truly,

JOHN BEN SHEPPERD
Attorney General

By Mary K. Wall
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